88-1714

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

KAREN MILLER,

Plaintiff-Petitioner,

v.

PUBLISHERS PAPER COMPANY, a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented For Review

1. Whether resolution of an employee's tortious wrongful discharge claim for being terminated in retaliation for pursuing the right to receive compensation in the form of disability benefits, which are provided pursuant to a collective bargaining agreement, does not require interpretation of the agreement and therefore is exempt from preemption by § 301 of the Labor Management Relations Act.

2. Whether Plaintiff-Petitioner raised a genuine issue of material fact as to whether her local and parent unions breached the duty of fair representation they owed her by:

(a) failing to inform her that her employer planned to terminate her if her physicians testified at her personal injury trial that she was permanently disabled;

(b) acquiescing in her employer's termination of her based upon a comparison of her ability to perform her former job which had been eliminated by the time of her termination;

(c) failing to inform her that the unions' official who investigated her grievance had recommended that it be dropped and that his recommendation was to be voted upon at a December 27, 1984 regular local union membership meeting; and/or

(d) failing to inform her in a timely manner that her grievance had been withdrawn.

3. Whether the Ninth Circuit Court of Appeals erred in granting summary judgment against Plaintiff-Petitioner on her breach of contract claim on the basis that she had not raised a genuine issue of material fact as to whether her local and

parent unions had breached their duty of fair representation owed to her.

Parties To The Proceeding

The caption of the case in this Court contains the names of all parties to the proceeding in the Ninth Circuit Court of Appeals, whose judgment is sought to be reviewed.

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PUBLISHERS PAPER COMPANY, a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Karen Miller, the Plaintiff-Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth

Circuit entered in the above-entitled case on October 20, 1988 and December 21, 1988.

Opinions Below

The original Memorandum opinion of the Ninth Circuit Court of Appeals, entered on October 20, 1988, is attached as Appendix A hereto. The Order Granting Petition For Rehearing And Amending Memorandum Disposition, dated December 21, 1988, is attached as Appendix B hereto.

The Findings and Recommendation of U. S. Magistrate Dale dated September 19, 1986 is attached as Appendix C hereto. The November 19, 1986 Order of the United States District Court for the District of Oregon adopting those Findings and Recommendation is attached as Appendix D hereto.

The Findings and Recommendation of U. S. Magistrate Dale dated April 14, 1987 is attached as Appendix E hereto. The June

29, 1987 Order of the United States District Court for the District of Oregon adopting those Findings and Recommendation is attached as Appendix F hereto.

Jurisdictional Grounds

The dates of the Judgment sought to be reviewed are October 20, 1988 and December 21, 1988. (Appendices A and B). Judgment was originally entered by the Ninth Circuit Court of Appeals on October 20, 1988. (Appendix A). However, Plaintiff-Petitioner timely filed a Petition for Rehearing.

An Order Granting Petition for Rehearing and Amending Memorandum Disposition was entered on December 21, 1988. (Appendix B).

Jurisdiction to review the Judgment in question by writ of certiorari is conferred on this Court by 28 USC § 1254(1).

Statutory Provisions Involved

The statutory provision involved in this case is § 301(a) of the Labor-Management Relations Act, 29 USC § 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement Of The Case

Nature of the Case and Course of Proceedings

Plaintiff filed the original Complaint in this action on or about September 13, 1985 in the Circuit Court of the State of Oregon for the County of Clackamas. It was brought against Publishers Paper Company (hereafter "Publishers"), the Association of Western Pulp and Paper Workers, Local

No. 68 and the Association of Western Pulp and Paper Workers (hereafter "Unions"). It alleged one claim each for unlawful handicap discrimination in violation of ORS 659.425 against Defendant Publishers and against the Union Defendants, a tortious wrongful discharge claim against Defendant Publishers and a claim for breach of the duty of fair representation against all Defendants.

In her Complaint, Plaintiff alleged that Defendant Publishers had been her employer and that she had been a member in good standing of the Union Defendants. The Complaint further alleged that Plaintiff was injured in an automobile accident on or about April 27, 1982 which resulted in a continuing physical impairment.

The Complaint further alleged that Defendant Publishers committed the tort of wrongful discharge by terminating Plaintiff

because of her physical impairment and that the Defendants breached their duty of fair representation owed to Plaintiff by the Union Defendants failure to adequately investigate Plaintiff's charges; by failing to pursue her remedies under the applicable collective bargaining agreement; by failing to timely notify her of their decision not to take her grievance to arbitration, or alternatively by refusing to reasonably process her grievance because of her status as a handicapped person; and by failing to properly handle her grievance.

Defendant Publishers petitioned for removal of the action to the United States District Court for the District of Oregon. Thereafter Defendant Publishers moved for dismissal of the wrongful discharge and breach of the duty of fair representation claims against it for failure to state a claim for relief. The District Court

granted these motions on March 10, 1986. Plaintiff's motion to file an Amended Complaint was granted on March 14, 1986. Plaintiff thereafter was deemed to have filed an Amended Complaint as of March 14, 1986 with a revised Fourth Claim for Relief which she characterized as a breach of contract/breach of the duty of fair representation claim against Defendant Publishers and the Union Defendants respectively.

Defendants then moved for summary judgment on all claims. The District Court granted these motions on November 19, 1986. Thereafter the District Court granted Plaintiff's motion to file a Second Amended Complaint.

Plaintiff then filed a Second Amended Complaint on February 25, 1987 which contained a new claim for tortious wrongful discharge against Defendant Publishers and

which erroneously included several other claims which had previously been disposed of by summary judgment. Her new tortious wrongful discharge claim alleged in pertinent part that:

> "[A]fter April 27, 1982 Plaintiff was entitled to receive from Defendant Publishers as part of her compensation certain fringe benefits in the nature of disability payments which the employer had purchased through The Prudential Insurance Company of America, Plan #90855-33. Plaintiff was to receive not less than approximately $240.00 per week pursuant to that plan. Plaintiff would have been entitled to a continuation of said benefits had she not been terminated in September 1984. Plaintiff was terminated in September 1984 in retaliation for having claimed her right to receive said disability benefits. The right to receive said benefits is an important employee-related right as acknowledged by both state and federal statutes and case law which guarantees workers the right to receive the compensation which is promised to them."

Defendant Publishers then moved for summary judgment on Plaintiff's Second Amended Complaint and the Union Defendants moved to dismiss the Second Amended Complaint on the ground that the claims against them had already been removed from the case by summary judgment. The District Court granted these motions on June 29, 1987. Judgment was entered against Plaintiff the next day.

Plaintiff appealed the District Court's judgment against her to the Ninth Circuit Court of Appeals which affirmed.

Statement of Facts

Plaintiff was employed by Defendant Publishers from 1976 until her termination in September 1984. During that period of time she was a member of a bargaining unit represented by the Union Defendants. A collective bargaining agreement covered the bargaining unit in which Plaintiff was

employed and contained provisions for disability insurance coverage and for termination only for just cause.

On April 27, 1982 Plaintiff was injured in an automobile accident resulted in a continuing physical impairment. Plaintiff attempted to return to work as a washer operator for five days in January 1983 and again from March 8 through March 23, 1983 but she was unable to perform her work at that time because of her continuing injuries.

Prior to Plaintiff's August, 1984 trial concerning her injuries suffered in the car accident, Defendant Publishers informed the Union Defendants that if her doctors testified at trial that she was permanently disabled, Publishers intended to terminate her pursuant to Section D(2)(c) of the collective bargaining agreement.

That Section provided in pertinent part that,

> "[I]n any case where an employee is absent from work because of a physical disability the employee's rights to any benefit under this Agreement will be maintained for a period of twenty-four (24) months, unless any competent medical authority advises that such employee is deemed permanently disabled to the point where employment should not be resumed."

Prior to her personal injury trial, the Union Defendants did not apprise Plaintiff of Defendant Publishers' plan to terminate her. In September 1984, following her personal injury trial at which her doctors testified, Plaintiff received a letter from Defendant Publishers informing her that she was terminated based upon medical testimony at that trial which Defendant Publishers contended, "affirmed the fact that you are permanently disabled to the point that you are precluded from

returning to your former position at Publishers Paper Co."

Prior to September 1984, Plaintiff's former job had been eliminated. However, Plaintiff had continuing rights to other jobs in the plant as determined by her seniority and the terms of the collective bargaining agreement.

Plaintiff filed a grievance concerning her termination; her grievance was handled by the Union Defendants' Dale Heisler who recommended to the local Union Defendant on December 17, 1984 that her grievance be dropped prior to arbitration. This recommendation was discussed at a regular membership meeting of the local Union Defendant on December 27, 1984 at which time the members present voted to drop her grievance. At no time prior to the end of May 1985, when her reinstatement rights ended, was Plaintiff notified by any member

or representative of the Union Defendants of Mr. Heisler's recommendation or the decision to withdraw her grievance. In January 1985 Plaintiff's doctor released her back to work.

On September 13, 1985 Plaintiff brought this action.

Rulings Below

Tortious Wrongful Discharge Claim Contained in Second Amended Complaint

The District Court Magistrate recommended that Defendant Publishers' motion for summary judgment against Plaintiff on her tortious wrongful discharge claim contained in her Second Amended Complaint be granted. (Appendix E). The Magistrate, citing Allis-Chalmers Corp. v. Lueck, 471 US 202 (1985), opined that this claim was preempted by § 301 of the Labor Management Relations Act, 29 USC § 185 because in his

view resolution of this claim would substantially depend upon interpretation of the collective bargaining agreement. (Appendix E, p. 6). The District Court adopted the Magistrate's Findings and Recommendation without opinion. (Appendix F).

The Court of Appeals affirmed the ruling of the District Court. (Appendix A). It noted that Plaintiff asserted that her claim was that she was terminated in retaliation for requesting disability benefits. It then took the position that in order to decide this claim it would be necessary to interpret the provisions of the collective bargaining agreement that discusses payment of disability benefits and termination of employees. From that stance it concluded that this claim was preempted by § 301 because it was "inextricably intertwined" with consideration of

the terms of the collective bargaining agreement, citing Allis-Chalmers Corp. v. Lueck, supra, 471 US at 213. (Appendix A, pp. 3-4).

Breach of the Duty of Fair Representation Claim

The District Court Magistrate recommended that summary judgment be granted against Plaintiff on her claim for breach of the duty of fair representation. (Appendix C, pp. 9-17). The Magistrate noted that under Vaca v. Sipes, 386 US 171, 191 (1967), a union commits a breach of the duty of fair representation if it acts arbitrarily such as by processing a meritorious grievance in a perfunctory fashion. (Appendix C, p. 11). With regard to Plaintiff's general complaint that the Unions should have protested the employer's comparison of her ability to physically perform her former job which had been

eliminated, the Magistrate concluded that the Unions did not act arbitrarily. Id.

As for the Unions' failure to inform her of the employer's plans to fire her if her physicians testified at her personal injury trial that she was permanently disabled, the Magistrate determined that requiring them to do so would frustrate their ability to balance collective versus individual interests. Therefore, he concluded this conduct did not amount to a breach of the duty of fair representation. Id., at 11-12.

Finally, the Magistrate concluded that the Unions' decision to forego arbitration of Plaintiff's grievance was not based on her status as a "handicapped person" and therefore that decision did not constitute breach of the duty of fair representation. (Appendix C, pp. 14-17).

The District Court adopted the Magistrate's Findings and Recommendation without opinion. (Appendix D).

The Court of Appeals affirmed the ruling of the District Court. (Appendix A). It opined that Plaintiff's claims that the unions breached the duty of fair representation by failing to tell her that her employer planned to terminate her if her physicians testified at her personal injury trial that she was permanently disabled was untenable. The appellate court concluded that, "[B]ecause there is no evidence that appellant's doctors testified untruthfully at the trial, we must assume that prior knowledge of Publishers' intentions by appellant would not have affected her termination." (Appendix A, p. 7).

The Court of Appeals likewise dismissed Plaintiff's contention that the Unions' failure to object to the employer's

irrelevant job comparison constituted a breach of the duty of fair representation, stating that this was a matter of judgment within the unions' discretion and that Plaintiff had not shown that the Unions' failure to object was based on discriminatory or bad faith motives. (Appendix A, p. 7).

Finally, with regard to the Unions' failure to notify Plaintiff of the meeting at which a vote on whether to drop her grievance was to be made and its subsequent failure to timely notify her that her grievance had been withdrawn, the Court of Appeals held that the Unions' conduct was perhaps negligent but did not constitute a breach of the duty of fair representation. The Court of Appeals surmised that this was particularly so because in its view Plaintiff had not shown any prejudice.

Breach of Contract Claim

The Magistrate recommended that Publishers' motion for summary judgment on Plaintiff's breach of contract claim be granted based on his conclusion that the Unions had not breached their duty of fair representation owed to her. (Appendix C, p. 21). The District Court adopted these Findings and Recommendation without opinion. (Appendix D). The Court of Appeals affirmed this ruling for the same reason cited by the Magistrate. (Appendix A, pp. 7-8).

Basis for Federal Jurisdiction

The United States District Court had subject matter jurisdiction over Plaintiff's breach of the duty of fair representation and breach of the collective bargaining agreement claims pursuant to 29 USC § 185 and 28 USC § 1331 (federal question) and had pendent jurisdiction over

Plaintiff's state law handicap discrimination and tortious wrongful discharge claims.

Reasons For Allowing Writ Of Certiorari

I

Certiorari should be granted because the Ninth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

In this case the Ninth Circuit Court of Appeals in affirming summary judgment against Plaintiff's wrongful discharge claim interpreted the preemptive reach of § 301 in such a way that would eviscerate this Court's decision in Allis-Chalmers v. Lueck, 471 US 202 (1985), and Lingle v. Norge Division of Magic Chef, Inc., ___ US ___, 108 SCt 1877 (1988).

In Lingle this Court correctly focused the preemptive effect of § 301 by holding

that "an application of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement." Lingle, supra, 108 SCt at 1885. This holding was a faithful reexpression of the principles of preemption laid out by this Court in Allis-Chalmers.

In Allis-Chalmers this Court phrased the test for preemption in terms of the facts of that case as follows:

> "Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreements of private parties, are preempted by those agreements .... Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably

> intertwined with consideration of the terms of the labor contract." Allis-Chalmers, supra, 471 U. S. at 213, 85 LEd2d at 216, 105 SCt at 1912 (citation and footnote omitted).

Emphasizing the narrowness of § 301 preemption, this Court stated that, "[O]f course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of federal labor law." Allis-Chalmers, supra, 471 US at 211. Rather, it is only "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" that a state-law claim must be treated as a § 301 claim or be dismissed as preempted by federal labor law. Allis-Chalmers, supra, 471 US at 220.

The basis for Plaintiff's wrongful discharge claim is that Publishers terminated Plaintiff in retaliation for claiming her right to receive compensation in the form of disability benefits. This amounts to a wrongful discharge under Oregon common law for being terminated in retaliation for pursuing the publicly important job-related right of an employee to seek his or her compensation. Delaney v. Taco Time Int'l., 297 Or 10, 16, 681 P2d 114 (1984); ORS 652.320(a).

Only the barest of references to the collective bargaining agreement is necessary to resolve Plaintiff's wrongful discharge claim. The simple verification that the labor agreement provides for payment of disability benefits is all that is needed.

If Plaintiff were a non-union employee and was terminated in retaliation for pursuing her right to receive her promised

compensation there would be no question that her wrongful discharge claim would be exempt from § 301 preemption because interpretation of a labor agreement would not be involved. Here, just because Plaintiff was a union employee and resolution of her wrongful discharge claim necessitates only a passing reference to a collective bargaining agreement to verify the terms of her compensation should not be determinative of whether she is entitled to assert a tortious wrongful discharge claim. For in both the above hypothetical and Plaintiff's actual situation only a quick verification that the employees were entitled to compensation would be needed to resolve the claims.

The fact that the labor agreement contained terms governing the discharge of employees does not require preemption, contrary to the Ninth Circuit's ruling.

Those terms would only be pertinent to a breach of contract claim, not a tort claim. Indeed, this Court reversed a ruling by the Seventh Circuit Court of Appeals in Lingle that because a collective bargaining agreement prohibited discharges without just cause that a state-law wrongful discharge claim was "inextricably intertwined" with the labor agreement and was therefore preempted by § 301. Lingle, supra, 108 SCt at 1883.

The Ninth Circuit in holding that Plaintiff's wrongful discharge claim was preempted contravened this Court's pronouncement in Allis-Chalmers that, "[N]or do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties

to such an agreement, necessarily is pre-empted by § 301." Allis-Chalmers, supra, 471 US at 220.

To allow the Ninth Circuit's ruling in this case to stand would undermine the enunciations of § 301 preemption made by this Court in Allis-Chalmers and Lingle. Plaintiff's writ of certiorari should be granted.

II

Certiorari should be granted because the Ninth Circuit Court of Appeals' decision on Plaintiff's breach of the duty of fair representation claim is in conflict with decisions of this Court and of other federal Circuit Courts of Appeal.

Another issue here is whether a union's withholding of information vital to a member's ability to make an informed decision concerning her livelihood amounts to a breach of the duty of fair representation. Here Plaintiff presented evidence

showing that Publishers told the Unions that it planned to terminate Plaintiff if her doctors testified at her car accident trial that she was permanently disabled. There was further evidence presented that the Unions did not inform Plaintiff of the employer's plan. This deprived her of any chance to take any steps to avoid Publishers' planned termination of her.

The Ninth Circuit held that this did not amount to a breach of the duty of fair representation concluding that, "[B]ecause there is no evidence that appellant's doctors testified untruthfully at the trial, we must assume that prior knowledge of Publishers' intentions by appellant would not have affected her termination." (Appendix A, p. 7). This is faulty reasoning. Plaintiff could have taken any number of steps to avoid her termination had she known of her employer's plans, such as

attempting to settle her personal injury case before trial or having her doctors emphasize at trial that she was still physically capable of performing certain types of work.

This ruling by the Ninth Circuit is in conflict with Warehouse Union; Local 860, etc. v. NLRB, 652 F2d 1022 (DC Cir. 1981), where a union was held to have acted arbitrarily and thereby to have breached the duty of fair representation by failing to inform its clerical members of the employer's plan to terminate them if their demand for a wage increase was granted.

Here, the Unions' acquiescence in the employer's termination of Plaintiff based upon a comparison of her ability to perform her former job, which had been eliminated by the time of her termination, also constituted arbitrary and discriminatory conduct amounting to a breach of the duty

of fair representation. The Ninth Circuit's ruling to the contrary is in conflict with this Court's pronouncements in Vaca v. Sipes, 386 US 171 (1967), and the Fourth Circuit's opinion in Carpenter v. West Virginia Flat Glass, 763 F2d 622 (4th Cir. 1985). In the latter case an international union failed to have a doctor answer the key question involved in a member's grievance - whether he was physically able to work at the plant - and as a result the member was not reinstated. The Fourth Circuit, in a ruling contrary to the Ninth Circuit's in this case, held that the union processed the grievance in such a perfunctory manner as to amount to arbitrary conduct constituting a breach of the duty of fair representation. Carpenter, supra, 763 F2d at 625.

The Unions' failure to let Plaintiff know that the Unions' investigator had

recommended that her grievance be dropped, failure to tell her that a vote on whether to do so would be made at the December 27, 1984 membership meeting and failure to subsequently inform her prior to March 24, 1985 that her grievance had been dropped each constitutes a breach of the duty of fair representation. For such omissions amount to arbitrary conduct, Vaca v. Sipes, supra, 386 US at 177, and is akin to that found by other circuit courts to give rise to liability for breach of the duty of fair representation. See, e.g., Warehouse Union, supra. The Ninth Circuit's reasoning that Plaintiff was not prejudiced by this behavior, (Appendix A, pp. 6-7), is faulty as it is evident that Plaintiff could have argued against the recommendation to drop her grievance both before and at the membership meeting had she known of the recommendation and that it was to be

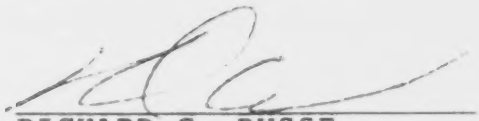
voted on at that meeting. Further, had she known prior to the end of her 24 month disability period that her grievance had been dropped she could have taken further action against her employer at a time when she could still claim existing employment rights.

Finally, as the Ninth Circuit granted summary judgment against Plaintiff on her breach of contract claim because of its improper affirmation of the grant of summary judgment against her on her breach of the duty of fair representation claim, the former ruling should be reversed if the latter is reversed.

CONCLUSION

Wherefore, Petition respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN MILLER, Plaintiff-Appellant, vs. PUBLISHERS PAPER CO., a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68 and; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants-Appellees.	No. 87-4081 D.C. No. CV-85-1816-DA MEMORANDUM* FILED Oct. 20 1988

Appeal from the United States
District Court
for the District of Oregon
Owen M. Panner,
District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted:
September 16, 1988
Portland, Oregon

Before: SCHROEDER, PREGERSON, and LEAVY, Circuit Judges.

The district court granted appellees' motions for summary judgment, holding that appellant's state tort claim for wrongful discharge against Association of Western Pulp and Paper Workers, Local No. 68 and Association of Western Pulp and Paper Workers ("Union") were preempted by federal law. The district court further held that Publishers did not violate a state handicap discrimination law and did not breach the collective bargaining agreement. Finally, the district court held that the Union did not breach its duty of fair representation.

Appellant contends that the district court erred in granting the motions for summary judgment, arguing that the wrongful discharge claim against Publishers and the handicap

discrimination claim against the Union are not preempted because they are based upon independent state rights. In addition, appellant contends that the state handicap discrimination claim against Publishers and the breach of the duty of fair representation claim against the Union should not have been dismissed as they raise genuine issues of material fact. Finally, appellant asserts that the claim against Publishers for breach of the collective bargaining agreement, which is dependent upon a finding of a breach of the duty of fair representation by the Union, also should have survived summary judgment.

STANDARD OF REVIEW

On appeal, appellant challenges the district court's grant of summary judgment in favor of Publishers and the Union. We therefore review all of the

issues raised by this appeal de novo. Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589, 591 (9th Cir. 1987).

DISCUSSION

I. State Tort Wrongful Discharge Claim Against Publishers

Appellant contends that her state tort claim for wrongful discharge is not preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), because consideration of the state law claim is not dependent on analysis of the terms of the collective bargaining agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985) ("[I]t would be inconsistent with congressional intent under [section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."). Appel-

lant asserts that the district court mischaracterized her claim as one to obtain disability benefits, when it was actually a claim that she was terminated in retaliation for requesting those benefits.

When resolution of a state law claim requires interpretation or analysis of the terms in a collective bargaining agreement, that claim is preempted by section 301. Lingle v. Norge Division of Magic Chef, Inc., __U.S.__, 108 S. Ct. 1877, 1881 (1988). In the instant case, in order to decide whether appellant's termination was in retaliation for requesting disability benefits, it would be necessary to interpret the provision of the collective bargaining agreement that discusses payment of disability benefits and termination of disabled employees. Thus, regardless of how appellant's

state wrongful discharge claim is characterized, it is preempted by section 301 because it is "inextricably intertwined" with consideration of the terms of the collective bargaining agreement. Allis-Chalmers, 471 U.S. at 213.

II. State Handicap Discrimination Claims Against Publishers and the Union

For appellant's state handicap discrimination claims to be timely under Oregon Revised Statutes (ORS) § 659.425, she must have commenced her lawsuit within one year after receiving notice of her termination from Publishers. ORS § 659.121(3). Appellant was informed of her termination on September 12, 1984; she filed suit on September 13, 1985. Under Oregon law, the day of the act (here, the date of receipt of the notice of termination) is not counted in computing the deadline for filing suit. Or. R. Civ. P.

10A; ORS § 174.120. Therefore, appellant had one year beginning September 13, 1984 to commence her lawsuit. This one year period ended on September 12, 1985. Because appellant did not file her lawsuit until one day later--September 13, 1985--her state handicap discrimination claims are time-barred.[1] See, e.g., Kirk v. Woods, 218 Or. 593, 346 P.2d 90, 92-93 (Or. 1959) (en banc) (where triggering event occurred on

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[1] In its analysis leading to dismissal of these two claims, the district court erroneously held that the handicap discrimination claim against Publishers was not time-barred, and therefore the court did not address the question whether the same claim against the Union was timely. However, the rule is well settled that where the decision of the district court is correct, it must be affirmed by the appellate court, even if the district court was in error regarding the ground or reason for its action. J.E. Riley Inv. Co. v. Commissioner of Internal Revenue, 311 U.S. 55, 59 (1940); Keniston v. Roberts, 717 F.2d 1295, 1300 n.3 (9th Cir. 1983).

March 11, 1958, one year period began to run on March 12, 1958, and ended on March 11, 1959), rev'd on other grounds, 290 Or. 53, 618 P.2d 1265, 1267 (Ore. 1980).[2]

Appellant's handicap discrimination claim is not frivolous. The claim raises issues under Oregon law which, had they not been time-barred, would have merited attention. Both the appellant and the district court had problems calculating this rather tricky one-year limitations period. In these circumstances, we decline to exercise

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[2] Our decision that appellant's handicap discrimination claims are time-barred fully resolves this issue. Therefore, we need not address whether the claims raise any genuine issues of material fact. Still, we do note that the Ninth Circuit has recently held that a state law handicap discrimination claim brought under ORS § 659.425--the very statute at issue here--is not preempted by section 301 of the LMRA. Miller v. AT&T Network Systems, 850 F.2d 543, 550 (9th Cir. 1988).

our discretion to grant attorneys' fees to the appellees under ORS § 659.121.

III. Breach of the Duty of Fair Representation Claim Against the Union

Appellant contends that the Union breached its duty of fair representation by (1) failing to inform her that Publishers planned to terminate her if her doctors testified at her personal injury trial that she was permanently disabled; (2) failing to object to Publishers' irrelevant comparison of her abilities to her original job, which had been eliminated; (3) failing to inform her of a union meeting at which withdrawal of her grievance would be considered; and (4) failing to inform her in a timely manner that her grievance had been withdrawn.

Under section 301, a union has a "statutory obligation to serve the interests of all members without hos-

tility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). However, to maintain the integrity of the arbitration process, unions must be given wide discretion to act in what they perceive to be their members' best interests. Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985). Thus, the grievance process need not be error free; more than a mere error of judgment must occur to constitute a breach of the duty of fair representation. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1482 (9th Cir. 1985). Breach occurs only when a union acts in an arbitrary, bad faith, or discriminatory manner. Vaca, 386 U.S. at 177. Arbitrary conduct on the part of a union which harms an employee

will result in a breach when procedural or ministerial acts are involved. Salinas v. Milne Truck Lines, Inc., 846 F.2d 568 (9th Cir. 1988). But, when a union's judgment is questioned, its conduct must have been discriminatory or in bad faith to constitute a breach; a showing of arbitrariness is not sufficient. Salinas, 846 F.2d at 568.

In the present case, the Union's failure to notify appellant of the meeting where her grievance would be discussed or the subsequent withdrawal of her grievance "was perhaps negligent, but not enough to constitute a breach of the union's duty of fair representation [particularly as no prejudice has been shown by appellant.]" Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1355 (9th Cir. 1981), rev'd on other grounds, 827 F.2d 1363, 1365 (9th Cir. 1987). In addi-

tion, the Union's failure to object to Publishers' allegedly irrelevant job comparison was a matter of judgment within the Union's discretion. Because appellant has not shown that the Union's behavior was based on discriminatory or bad faith motives, its failure to object was not a breach of the duty of fair representation. Finally, appellant's contention that the Union's failure to inform her of Publishers' intention to terminate her if her doctors testified that she was permanently disabled is equally untenable. Because there is no evidence that appellant's doctors testified untruthfully at the trial, we must assume that prior knowledge of Publishers' intentions by appellant would not have affected her termination.

IV. Breach of the Collective Bargaining Agreement Claim Against Publishers

To prevail against Publishers in her breach of the collective bargaining agreement claim, appellant would have to show not only that her "discharge was contrary to the contract, but [would also have to] carry the burden of demonstrating breach of duty by the Union." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976). Because we have found that the Union did not breach its duty of fair representation, appellant's breach of the collective bargaining agreement claim against Publishers also must fail. To hold otherwise would weaken the federal policy of finality in labor arbitration.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN MILLER, Plaintiff-Appellant, vs. PUBLISHERS PAPER CO., a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68 and; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants-Appellees.	No. 87-4081 D.C. No. CV-85-1816-DA ORDER GRANTING PETITION FOR REHEARING AND AMENDING MEMORANDUM DISPOSITION FILED Dec. 21 1988

Before: SCHROEDER, PREGERSON, and LEAVY, Circuit Judges.

We have reviewed the petition for rehearing. Appellant is correct that the memorandum disposition filed October 20, 1988 was in error in stating that appellant's state handicap discrimination claim against the Union was

barred by the statute of limitations. We agree with appellant that the statute would not have started to run at least until after she had filed her grievance, a date within the one-year statutory period.

Even though the claim under ORS § 659.425 was not time-barred, appellant's handicap discrimination claim against the Union was properly subject to summary judgment because appellant failed to raise a genuine issue of material fact in support of the claim. Therefore, the result of our disposition affirming the district court remains unchanged.

Appellant's petition for rehearing is granted and section II (from pages 4 to 5) of the memorandum disposition filed October 20, 1988 is amended to read:

II. State Handicap Discrimination Claims Against Publishers and the Union

For appellant's state handicap discrimination claim against Publishers to be timely under Oregon Revised Statutes (ORS) § 659.425, she must have commenced her lawsuit within one year after receiving notice of her termination from Publishers. ORS § 659.121(3). Appellant was informed of her termination on September 12, 1984; she filed suit on September 13, 1985. Under Oregon law, the day of the act (here, the date of receipt of the notice of termination) is not counted in computing the deadline for filing suit. Or. R. Civ. P. 10A; ORS § 174.120. Therefore, appellant had one year beginning September 13, 1984 to commence her lawsuit against Publishers. This one year period ended on September 12, 1985. Because appellant did not file

her lawsuit until one day later--September 13, 1985--her state handicap discrimination claim against Publishers is time-barred. See, e.g., Kirk v. Woods, 218 Or. 593, 346 P.2d 90, 92-93 (Or. 1959) (en banc) (where triggering event occurred on March 11, 1958, one year period began to run on March 12, 1958, and ended on March 11, 1959), rev'd on other grounds, 290 Or. 53, 618 P.2d 1265, 1267 (Or. 1980).

Appellant's handicap discrimination claim against the Union was properly subject to summary judgment because appellant failed to raise a genuine issue of material fact in support of her claim that the Union discriminated against her due to her physical handicap.[1] Even assuming that ORS §

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[1] The district court held that appellant's handicap discrimination claim against the Union was preempted by federal labor law. The Ninth Circuit has recently held that a state

659.425(3) is not limited to union membership decisions,[2] appellant's claim is not supported by facts that could reasonably lead a finder of fact to conclude that the Union's failure to pursue appellant's grievance through all available steps was due to the Union's discrimination against appel-

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handicap discrimination claim brought under ORS § 659.425--the very statute at issue here--is not preempted by section 301 of the LMRA. Miller v. AT&T Network Systems, 850 F.2d 543, 550 (9th Cir. 1988). However, the rule is well settled that where the decision of the district court is correctly, it must be affirmed by the appellate court, even if the district court was in error regarding the ground or reason for its action. J.E. Riley Inv. Co. v. Commissioner of Internal Revenue, 311 U.S. 55, 59 (1940); Keniston v. Roberts, 717 F.2d 1295, 1300 n.3 (9th Cir. 1983).

[2] ORS§ 659.425(3) provides:

It is an unlawful employment practice for a labor organization, because an individual is a handicapped person, to exclude or to expel from its membership such individual or to discriminate in any way against such individual.

lant because of her physical impairment. See California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 108 S. Ct. 698, 699 (1988) (when non-moving party will bear burden of proof at trial as to element essential to its case, and that party fails to make a showing sufficient to establish genuine dispute of fact with respect to existence of that element, then summary judgment is appropriate) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The decision not to pursue the grievance any further was based on the Union's judgment that the claim did not merit further efforts. This decision, absent any showing of discriminatory motives, does not raise a genuine issue that would need to be resolved at trial. See id.

Appellant's handicap discrimination claims are not frivolous. The claim against Publishers raises issues under Oregon law which, had the claim not been time-barred, would have merited attention. Both the appellant and the district court had problems calculating this rather tricky one-year limitations period. Nor is the claim against the Union so baseless as to warrant an award of attorneys fees to the Union. In these circumstances, we decline to exercise our discretion to grant attorneys' fees to the appellees under ORS § 659.121.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KAREN MILLER, Plaintiff, v. PUBLISHERS PAPER CO., A Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants.	)	No. 85-1816-DA FINDINGS AND RECOMMENDATION FILED Sep. 19 1986

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DALE, Magistrate

Plaintiff Karen Miller brings this action against her former employer and former union. Miller claims the employer breached its collective bargaining agreement and that the union breached its duty of fair representation in declining to take her grievance to arbitration. The court has jurisdiction over these interdependent but analytically distinct claims pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a). Miller also raises pendent claims in which she alleges that the union and the employer committed an unfair employment practice, the union by dis-

criminating against her on the basis of handicap, O.R.S. § 659.425(3), the employer on the basis of physical or mental impairment, O.R.S. § 659.425 (1)(a). The defendants move for summary judgment.[1] The motions should be granted.

Facts

The following facts are not in dispute unless otherwise indicated. Miller began her employment at Publishers Paper Company (the Employer or Publishers) in 1976. The terms and conditions governing Miller's employment are covered by a collective bargaining agreement (the CBA) between the Employer and the Association of Western Pulp and Paper Workers, a national labor organization certified by the National Labor Relations Board, and its affiliated Local No. 68 (collectively the Union). Miller became a Union

member soon after she began her employment with Publishers.

On April 27, 1982, Miller was injured in an automobile accident. The accident left her in considerable pain. Because of her physical condition, she did not return to work for the remainder of that year. She worked for two brief periods after her accident, the first time from January 3 through 11, 1983, and the second from March 8 through 29, 1983. However, discomfort prevented her from being able to do the physical labor necessary to perform her job of washer operator. Her job included some duties that were physically demanding, particularly the occasional disassembling of a washer unit. This task involved the use of air wrenches, 10-inch crescent wrenches and pressurized water hoses.

Plaintiff filed suit in state court against the driver of the automobile that injured her to recover damages for the injuries she sustained in the auto accident. She alleged in that case that her injuries "seriously and permanently" impaired her ability to work. (Employer's exhibit 8 at 3). The personal injury case was tried in August, 1984. Miller and two of her doctors testified as to her physical condition. In a deposition taken October 14, 1983, Miller testified that she had been unable to engage in physical recreation activity since her accident. She was unable to do any gardening since the accident. In fact, she testified that her range of motion was so constricted that she was unable to drink "the last half of a 16-ounce Coke." (Employer's exhibit 5 at 2). Miller's testimony at trial was basi-

cally consistent with her deposition testimony. For example, she testified that she could not vacuum and needed help changing beds.

Dr. Hazel, an orthopedic specialist, testified at the trial that there was "no question" in his mind that the work she performed for Publishers exacerbated her symptoms. In his opinion, Miller would not be able to return to her old job or perform any other job that involved similarly heavy work. (Employer's exhibit 7 at 6-7).

Dr. Harris, a chiropractor, testified at the trial that in his opinion Miller's problems were not going to change significantly. He opined that Miller would have to deal with the pain she had been experiencing up to that point "the rest of her life." (Employer's exhibit 7 at 11). Dr. Harris testified that Miller's ability to

carry weight was severely circumscribed by the accident. Indeed, Dr. Harris testified that it would be "very difficult" for Miller to do clerical work. (Union exhibit 8 at 14).

The jury returned a verdict in plaintiff's favor for approximately $55,000.

Soon after the trial was over, the Employer wrote plaintiff a letter dated August 30, 1984. The letter informed Miller that her employment was being terminated effective September 1, 1984. According to the letter, the termination was "based on the medical testimony presented by competent medical authority in your most recent legal proceedings. This testimony affirmed the fact that you are permanently disabled to the point that you are precluded from returning to your former position at Publishers Paper Co." (Employ-

er's exhibit 2). In making this decision, the Employer relied on Section 20D(c) of the CBA. That section provides in relevant part:

> In any case where an employee is absent from work because of a physical disability the employee's right to any benefit under the Agreement will be maintained for a period of twenty-four (24) months, unless any competent medical authority advises that such employee is deemed permanently disabled to the point where employment should not be resumed.

(Employer's ex. 9).

The Employer advised the Union standing committee in a meeting on August 21, 1984, prior to the trial, that if there was medical testimony that indicated Miller was permanently disabled, Publishers intended to exercise its rights under this term of the CBA and terminate Miller's employment and benefits. The Union did not inform Miller of the company's position prior to trial.

For most disputes, the CBA contains a five-step grievance procedure. The final step is binding arbitration. However, for cases involving discharge or suspension from employment, only two steps are involved. The first involves a meeting between the local mill manager, or his representative, and the local union standing committee. If the grievance is not resolved at this meeting, the Union decides whether to pursue arbitration.

Miller received the letter of termination on September 12, 1984. She spoke with her Union representative, Kenneth Hardwick. She told Hardwick she felt she was unable to go back to work at that time, but that she should be given until March ~~to be~~ able to have that determined. At her request, Hardwick filed a grievance on her behalf on September 13, 1984. Two days later a

meeting was held between the Union and management standing committees over plaintiff's grievance. Management reiterated that plaintiff's own medical doctors had testified that she was permanently disabled in her auto accident trial. The Union pointed out that other doctors had testified at the trial that plaintiff was not permanently disabled. The Union suggested that an independent, impartial doctor, be selected to conduct an evaluation, the results of which would be binding. Management rejected this suggestion and stood by its decision to terminate plaintiff's employment under the terms of the CBA section quoted above.

The Union then referred the matter to Dale Heisler, one of two area Union representatives for the State of Oregon. Heisler met with an Employer representative, L. A. Nilson, on Oc-

tober 26, 1984. Heisler again pressed for an independent medical opinion, but Nilson refused. However, Nilson did agree to defer the company's final position until he, Nilson, had received a transcript of the trial testimony of Miller's physicians. On December 7, 1984, Heisler received a letter from Nilson and a copy of the trial transcript. Nilson denied the grievance. The deadline for arbitration was January 4, 1985.

Heisler had spoken with Miller on the telephone both before and after the Nilson meeting. Miller told him that she was not able to return to work at that time, but that she felt she should have the opportunity to go back to work if her condition improved. Based on his own careful review of the transcript, Heisler advised Miller that in his opinion, the CBA gave Publishers

the right to take the action it did because of her physician's testimony which could easily be taken to mean that she was permanently disabled. In his view, arbitration would not be successful.

On December 17, 19884, Heisler recommended in a letter to the Union that the Union drop plaintiff's grievance and forego arbitration based upon the doctors' testimony and Heisler's interpretation of Section 20D(c). On December 27, 1984, at a regular meeting of the local union, Miller's grievance was discussed, along with Heisler's recommendation. It was decided to drop the grievance. On January 25, 1985, the Union formally withdrew Miller's grievance. Hardwick "believes" he reported the decision to plaintiff within a couple of weeks of the December meeting. (Union's exhibit 2 at 3).

However, there is a factual dispute as to this point, because Miller states in her affidavit that "[a]t no time prior to May, 1985" did the Union inform her either orally or in writing that it had decided to withdraw the grievance and forego arbitration.

Beginning in September, 1984, a few months after the trial and about the same time Miller received her termination notice from Publishers, Miller began seeing Dr. Sie Sian Ming Hung, an acupuncturist. At a deposition taken for this case, Miller testified that from the first time she had a treatment she could "tell a result." (Employer's exhibit 6 at 7). Her condition steadily and dramatically improved over the next four to six months. Sometime around February or March, 1985, Miller was of the opinion that she could have returned to her former job at Publish-

ers. Between March, 1983, and September, 1984, Miller's job in Mill C was eliminated, but there were other less taxing jobs available in the plant. Nothing in the record shows that the Employer was required under the CBA to place Miller in those jobs. The record is unclear as to whether washer operator jobs were available in other mills at Publishers.

Miller filed this action on September 13, 1985.

Standards

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court of the United States recently interpreted Fed. R. Civ. P. 56. It stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, ___U.S.___, 106 S. Ct. 2548, 2552-53 (1986).

Discussion

A. The Union

1. Breach of the duty of fair representation

The duty of fair representation is not mandated explicitly by Congress. Rather, it is a judicially-established rule imposed on labor organizations because of their status as the exclusive bargaining unit. Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985) cert. denied, 106 S. Ct. 1642

(1986). A union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." Id. quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967). Over the years, a variety of factual circumstances have been tested to determine whether conduct falls under the Vaca standard.

Miller alleges that the Union

> failed to adequately investigate plaintiff's claims, failed to pursue plaintiff's remedies under the Collective Bargaining Agreement and failed to seasonably notify plaintiff of its decision not to take her grievance to arbitration; or, in the alternative, refused to reasonably process her grievance because of plaintiff's status as a handicapped person. [¶] [The Union's] handling of plaintiff's grievance was done in a negligent, perfunctory and arbitrary manner; or, in the alternative, in a discriminatory manner, and breached [the Union's] duty to fairly represent plaintiff. Plaintiff learned of said breach on or about May, 1985.

(Proposed Amended Complaint ¶¶ 22, 23).

The Union more than adequately investigated the factual basis underlying Miller's claim. The Union took the position id did based on its reasonable interpretation of the pivotal CBA provision quoted above. Heisler studied the trial transcript. There was no serious question as to its authenticity. Further investigation would have revealed nothing material to Miller's grievance.

Miller's claim that the Union breached its duty of fair representation by failing to pursue her remedies under the CBA also fails. Heisler's decision to recommend that the Union forego arbitration was clearly based entirely on his good faith belief that the grievance had no merit.

The Ninth Circuit has recognized that courts should grant "substantial

deference" to a Union's decision to pursue or not pursue a particular grievance because in making that decision, the Union balances many collective and individual interests. Johnson v. United States Postal Service, 756 F.2d 1461, 1466 (9th Cir. 1985). See also Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953).

Miller argues that section 20D(2)(c)'s phrase "competent medical authority" contains implied conditions that a physician's advice must be based on a reasonably current examination, knowledge of the physical requirements the employee will encounter in available employment, and finally, that the physician's examination must be conducted in light of the actual employment requirements. Miller's claim would fail even if the court ultimately were to agree with Miller's interpreta-

tion of section 20D(2)(c), an interpretation which is not patently unreasonable.

A union's representation of its members need not be error free. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1482 (9th Cir. 1985). The critical question is whether the Union's conduct was so egregious as to constitute "arbitrary" conduct. A union acts arbitrarily if it "ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion." Vaca v. Sipes, 386 U.S. at 191. Clearly here, it has not. It cannot be said that the Union ignored this grievance. Miller's argument merely demonstrates a bona fide disagreement with the Union over the interpretation of the CBA.

Miller also argues that in failing to notify her of its pretrial meeting with management in which management

informed the Union of its decision to terminate Miller if competent medical evidence showed permanent disability, the Union "acted in reckless disregard" of her rights. Miller cites no authority in a similar factual context to support her argument. It would frustrate the union's ability to balance collective versus individual interests if, as part of its duty of fair representation, the union were required to disclose such communications with management to affected union members. Unions have more than the personal interest of individual members to think about. The failure to disclose does not constitute a breach of the union's duty of fair representation under the facts presented here.

Miller also claims that the Union failed to "seasonably notify" her of its decision not to take her grievance

to arbitration. Miller states in a sworn affidavit: "At no time prior to May, 1985 did any member or representative of AWPPW [the Union] inform me orally or in writing that AWPPW had decided not to continue processing my grievance against Publishers concerning my termination by Publishers."[2] Under the most liberal and favorable of inferences, this statement could be taken to mean that until May, 1985, Miller was under the impression that the Union was still pursuing her grievance filed seven months earlier.[3] Plaintiff cites Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978). The case is easily distinguished. In Robesky, the union persuaded the company to offer a discharged employee a settlement that included reinstatement. In exchange, the Union withdrew the matter from arbitration, but failed to

disclose that fact to the employee despite an opportune time to do so. The employee, under the apparent impression that she could reject the settlement and still pursue arbitration, refused the settlement. The company then refused to renew the settlement offer once the employee learned that her arbitration remedy was lost to her. The prejudice to the employee under the unusual facts in Robesky is patent.

In Karahalios v. Defense Language Institute, 613 F. Supp. 440 (D.C. Cal. 1984), the court cited Robesky for the general proposition that failure to disclose critical facts can under certain circumstances constitute arbitrary conduct under Vaca v. Sipes. In Karahalios, two men were competing for the same teaching position which in the first instance was given to plaintiff.

The union failed to notify plaintiff that it had decided to pursue the competitor's grievance to arbitration. The arbitrator awarded the position to the competitor. Plaintiff was deprived of his opportunity to present his case to the arbitrator. The prejudice is again patent.

As the court stated in Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983), terms like "reckless disregard" and "simple negligence" are merely labels. It is better practice to compare facts of one case to another. In Dutrisac, the union, without any justifiable excuse, filed a grievance two weeks late. As a result of this omission, the employee lost his opportunity to arbitrate. The opportunity for arbitration was lost not as a result of a decision by the union on the merits, but from the failure of a

union official to file a piece of paper. The court held that negligence alone could constitute a breach of the duty of fair representation in which the individual interest is strong and the union fails to perform a ministerial task that completely extinguishes the employee's right to pursue his claim.

None of these cases provide solace to Miller. She has shown no prejudice. She has not shown that the Union failed to perform a ministerial task that completely extinguished her right to arbitration. She had no right to pursue arbitration herself. That was a Union decision. Even if she had been notified that her grievance would be discussed at the regularly-scheduled union meeting, all reasonable inferences from the evidence indicate that after Heisler had made his recommenda-

tion, the Union would not have pursued arbitration under any circumstances.

Miller's more troublesome allegation, at least theoretically, is that the Union breached its duty of fair representation because "it refused to reasonably process her grievance because of plaintiff's status as a handicapped person." (Proposed Amended Complaint 22). In Vaca v. Sipes, the Court explained that a union has the duty

> to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. at 177. Vaca's reference to discrimination is not surprising in light of the fact that the doctrine of the duty of fair representation had its genesis in a case in which a union was blatantly discrimi-

nating against blacks. Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

The parties have cited no hybrid fair representation claim under § 301 of the LMRA in which a state or federal court has squarely held that as a matter of federal labor law a union breaches its duty of fair representation if it discriminates against one of its members on the basis of handicap. Nor have they cited any decision of the National Labor Relations Board to that effect. See Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enf't denied, 326 F.2d 172 (2d Cir. 1962). I have found none. As a more fundamental matter, the parties have not provided any authority either purporting to define "handicapped" in this context as a matter of federal labor law or offered any suggestion of an analytical frame-

work for deciding such a claim. Despite these omissions, the Union nevertheless argues here that it has not violated its duty of fair representation.

In support of its argument that federal labor law preempts O.R.S. § 695.425(3), discussed infra, the Union cites Maynard v. Revere Copper Products, Inc., 773 F.2d 733 (6th Cir. 1985). In Maynard, the employee returned to work after time off following an on-the-job injury. The employee claimed that the employer ignored medical restrictions limiting his activities to light work. He subsequently reinjured himself while attempting to perform heavy manual labor. Id. at 734. He filed a pro se action in state court alleging that the union had refused to take any action on his behalf or to represent him before the em-

ployer. The case was removed to federal court. The court treated the claim as one for breach of the duty of fair representation under § 301 of the LMRA and concluded that it was time barred. The court also held that the pendent state claim under the Michigan Handicappers' Civil Rights Act, M.C.L.A. § 37.1101 et seq., was preempted by federal labor law. The court assumed without much discussion that federal labor law would prohibit a union from discriminating against someone who is "handicapped." However, the court was not obliged to give substance to that federal law, which it assumed existed, because the action was barred by the six month statute of limitations. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

"Discrimination" is not a talismanic term the incantation of which

necessarily results in a finding that a union has breached its fair representation duty. See Elliott v. United States Postal Service, 621 F. Supp. 1093, 1097 (W.D. Mich. 1985). Careful reading of the cases make clear that a union does not breach its duty of fair representation merely by engaging in an act which might conceivably be characterized by some as discriminatory. Unions "discriminate" in the sense of making choices and allocating scarce resources daily. There is nothing improper about this. Rather, the breach occurs because the union has made a decision to act or to refuse to act on the basis of a factor that is invidious. Reliance on that factor renders the decision arbitrary and consequently unfair. The factor that comes to mind most readily is race, e.g., Steele, supra, but this principle

has evolved and been applied as a matter of federal labor law in other contexts as well. See, e.g., Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) (gender); Retana v. Apartment & Elevator Operators Local 14, 453 F.2d 1018 (9th Cir. 1972) (non-English language speaking ability); Local 13 v. Pacific Maritime Association, 441 F.2d 1061, 1066 (9th Cir. 1971) (personal animosity).

Nothing in the record before me suggests that the Union's decision to forego arbitration was based on plaintiff's status as a "handicapped person," however that term may one day be defined as a matter of federal labor law. It is unnecessary to define the term in this case. The facts show conclusively that the motivation for the Union's decision was based not on Miller's status as a "handicapped per-

son," but on the Union's interpretation of the contract[4] and its reasonable and good faith belief, given that interpretation, that arbitration would be unsuccessful.[5]

Applying principles of federal labor law, I conclude, as a matter of law, that the Union did not breach its duty of fair representation. The Union is entitled to summary judgment on this claim.

2. The state discrimination claim

The union argues that federal labor law concerning a union's duty of fair representation preempts Miller's state law unfair employment practices claim.

Miller alleges that the Union

> refused to fully pursue plaintiff's grievance through all available steps. [The Union's] refusal to pursue all of plaintiff's remedies was discriminatory as it was based on plaintiff's physical impairment, or in the

> alternative upon [the Union's] perception of plaintiff's physical impairment. Such discrimination is an unlawful employment practice under ORS 656.425(3).

The Oregon statute was added by the Legislature in 1979. To my knowledge, no reported Oregon case has construed it. It provides:

> It is an unlawful employment practice for a labor organization, because an individual is a handicapped person, to exclude or to expel from its membership such individual or to discriminate in any way against such individual.

O.R.S. § 659.425(3).

The Union argues first that the Oregon statute is limited to union membership decisions. Second, the Union argues that if the statute is broad enough to apply here, that federal labor law, which defines a union's duty of fair representation, preempts O.R.S. § 659.425(3).

Neither party has cited an legislative history that might be helpful in

discerning the intent of the Oregon Legislature. On its face, the language is indeed quite broad, defining as an unlawful employment practice, activity which "discriminate[s] in any way against [a handicapped person]. There is no indication from this language that the Oregon Legislature intended to limit the statute's scope to membership decisions. I conclude that the statute is broad enough to cover the Union conduct challenged here. See Bush v. Greyhound Lines, Inc., 295 Or. 619, 622, 669 P.2d 324 (1983) ("Legislature created statutory right of action for discrimination against the handicapped by labor organization.") (dictum).

The parties inform me that the Ninth Circuit has not had occasion to rule whether federal labor law preempts a claim brought by a union member against his union premised upon a state

law discrimination statute. The issue is not one of first impression in the federal courts, however, as the Union is quick to point out. As discussed earlier, in Maynard v. Revere Copper Products, Inc., 773 F.2d 733 (6th Cir. 1985), plaintiff's claim that his union breached its duty of fair representation was untimely under DelCostello. He argued that he stated a claim under a Michigan statute that made it unlawful for a labor union to "[f]ail to fairly and adequately represent a member in a grievance process because of a member's handicap." 773 F.2d at 735.

The court held that federal labor law preempted the state claim. In holding as it did, the court emphasized that the duty of fair representation involves an area of labor law which has been so fully occupied by Congress as to foreclose state regulation. Id.

Plaintiff cites Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) for the proposition that states may supplement existing federal remedies. In Alexander, the Supreme Court held that an employee who pressed a claim of discriminatory discharge as a grievance through unsuccessful arbitration was not precluded from bringing an action in federal court under Title VII. The court in Maynard was unpersuaded that Alexander counseled against preemption of state laws dealing with the same duty as that defined in fair representation claims. I agree, primarily for the reason that Alexander involved the interaction of two federal statutes. The language of the Michigan statute is admittedly more tailor-fit to a breach of a duty of fair representation claim, but the Oregon statute, as I have construed it and as Miller seeks to have

it applied here, purports to regulate the same wrong as the Michigan statute.

Miller claims that the statute "goes beyond the general duty of fair representation to address the specific perceived problem of handicap discrimination by labor organizations." (Plaintiff's memorandum at 15-16). She contends that the burdens imposed upon her under the state statute are different from those imposed under federal labor law because, in her view, success in a breach of the duty of fair representation suit depends on a successful showing of breach of the underlying contract. No similar burden falls upon those who bring a state law discrimination claim against a union. The fallacy of this argument is in plaintiff's incorrect assumption that a hybrid § 301 suit is the only means of obtaining relief. Outside the context of a hy-

brid § 301 suit, Miller would be required to bring her claim before the NLRB because the claim is arguably an unfair labor practice. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). She need not prove breach of contract to establish a claim before the administrative body Congress has entrusted with the administration of the National Labor Relations Act.

The Union is entitled to summary judgment because O.R.S. § 659.425(3) is preempted by federal labor law.

B. The Employer

1. The breach of contract claim

Miller is entitled to bring suit against Publishers Paper for breach of a collective bargaining agreement. Smith v. Evening News Association, 371 U.S. 195 (1962). However, exhaustion of any grievance or arbitration mechanism provided in the CBA is ordinarily

required. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). One exception to this rule, recognized in Vaca, is where a union has failed to fairly represent its members. Other exceptions are inapplicable here. It is undisputed that Miller's grievance was not taken to binding arbitration. My conclusion that the Union did not breach its duty of fair representation compels the court to grant summary judgment to the Employer on the breach of contract claim. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976).

2. The state discrimination claim

The Employer argues that the claim is untimely. O.R.S. § 659.121(3) requires that a plaintiff commence a civil action for handicap discrimination "within one year of the occurrence

of the alleged unlawful employment practice." Because this is a pendent claim that arises under Oregon law, I look to Oregon law to resolve the issue.

Plaintiff alleges that on or about September 1, 1984, the Employer terminated her for the sole reason of her handicap despite plaintiff's ability to perform her job with reasonable accommodation by the Employer. Plaintiff's termination allegedly violated O.R.S. § 659.425(1)(a). (Proposed amended Complaint 6). From these allegations, it is clear the unlawful employment practice of which plaintiff complains is the termination. It is equally clear from the record that plaintiff received notice of the termination on September 12, 1984.[6]

The parties have not presented any definitive Oregon authority applying

O.R.S. § 659.121(3) in a handicap discrimination context. Despite the lack of authority, I conclude, consistent with the generally applicable rule of discovery in Oregon limitations statutes, that the cause of action accrued and the statute of limitations began to run on the day plaintiff knew or should have known that the company was terminating her. The Employer contends that the action is untimely because it was filed on September 13, 1985 exactly one year and one day after plaintiff received notice of the termination on September 12, 1984. The Employer contends that the statute of limitations began to run on the day plaintiff received notice. Generally in Oregon law, however, in computing time deadlines, one does not count the day of the act, event or default from which the designated period of time began to

run. Or. R. Civ. P. 10A; O.R.S. § 174.120. Given this rule, plaintiff's last day to file a timely action was September 13, 1985. She did so. The handicap discrimination claim is timely.

The Employer argues that Oregon law was not violated because at the time of her discharge, plaintiff was unable to perform her past job. I agree. O.R.S. § 659.425(1), the statute on which Miller bases her claim, provides:

> [I]t is an unlawful employment practice for any employer to refuse to hire, employ, or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because: (a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved.

Oregon's Bureau of Labor and Industries interprets the statute to mean

that a person, in order to take advantage of the statutory protections afforded by O.R.S. § 659.425(1), must "be able to perform the duties of the position occupied or sought." O.A.R. 839-06-225(1).

Quite recently, this principle was articulated by the Oregon Court of Appeals.

> In determining whether a discharge for a physical impairment constitutes an unlawful employment practice under ORS 659.425(1), the focus of the inquiry is whether the employee is actually prevented by the impairment from adequately performing work duties.

Brown v. Portland, No. A34833, slip op. (July 30, 1986) (available on LEXIS). See also Quinn v. Southern Pacific Transportation Co., 76 Or. App. 617, 711 P.2d 139 (1985), rev. den. 300 Or. 546 (1986).

The record amply demonstrates and Miller does not dispute that she was

physically incapable of performing her former job at the time she was discharged. I conclude that Miller has failed to prove a necessary element to succeed on the state law discrimination claim.

Miller's remaining arguments have no merit.

Conclusion

The Union's motion #25 and the Employer's motion #22 for summary judgment should be granted.

DATED this 19th day of September, 1986.

/s/ William M. Dale
WILLIAM M. DALE
U. S. Magistrate

FOOTNOTES

1 I recommended on December 5, 1985, and Judge Panner ordered on March 10, 1986, that plaintiff's state claim for wrongful discharge and federal breach of duty of fair representation claim in the initial complaint be dismissed as against the employer for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Following the filing of my findings and recommendation, but before Judge Panner had ruled on it, plaintiff filed a motion for leave to file an amended complaint, attaching what appears to be an original pleading entitled "Proposed Amended Complaint," signed by plaintiff's counsel. Plaintiff had filed objections to the December 5 findings and recommendation to dismiss the fair representation claim as against the employer. Because the proposed amended complaint contained claims which I had recommended be dismissed, I deferred ruling on the motion for leave to amend pending action by Judge Panner on my findings and recommendation. After Judge Panner adopted my recommendation, I granted the motion to file the amended complaint, to which no objection had been raised. For reasons unknown, the amended complaint has never formally been filed. It should have been. The general practice in this court is to reproduce a copy of the proposed amended pleading to the motion for leave, and then file the original pleading after leave is granted. However, the parties in their memoranda, cite to the amended complaint as if it had been filed. All sides operate under the assumption that the operative complaint in this case is the amended

complaint, "filed" on March 14, 1986, the day I granted the motion for leave to allow its filing. The court will operate under the same assumption. The amended complaint is deemed to have been filed as of March 14, 1986. Of course, plaintiff's third claim for wrongful discharge should be dismissed as well as any purported claim against the employer for breach of the duty of fair representation for the same reasons stated in the December 5, 1985, recommendation.

2 Significantly, the affidavit does not state that Miller was simply unaware that the Union had dropped her grievance. In careful language it states Union officials and members did not tell her that it had been dropped. Of course, Miller could have learned of the Union's decision from others.

3 There is an obvious question as to whether this action is timely under DelCostello. The Union recognizes this defense but does not press it in this motion, presumably because it felt the material facts as to the defense are in dispute. See text accompanying note 2 supra.

4 This is not a case where a contract term is blatantly illegal as a matter of either federal or state law. If that were the case a union might breach its duty of fair representation by failing to pursue a claim that has obvious merit.

5 This conclusion makes it unnecessary for me to address the Union's argument that the employer's termination of plaintiff's employment was a valid rec-

ognition of a seniority system established by the labor agreement and therefore exempt from being an unlawful employment practice by O.R.C. § 659.028 and arguably O.R.S. § 659.420(3).

6 The proposed amended complaint alleges September 15, 1984, but unrefuted evidence in the form of a return receipt signed by Miller indicates she received notice on September 12, 1984. (Employer's exhibit 3).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KAREN MILLER, Plaintiff, v. PUBLISHERS PAPER COMPANY, A Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO.68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants.	)	Civil No. 85-1816-DA ORDER FILED Nov. 19 1986

PANNER, J.

Magistrate William M. Dale filed his Findings and Recommendation on September 19, 1986. The matter is now before me. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the record de novo review. Lorin Corp v. Goto & Co., Ltd., 700 F.2d 1202, 1206 (8th Cir. 1983). See also Britt v. Simi Valley Unified

School Dist., 708 F.2d 452, 454 (9th Cir. 1983). I find no error. Accordingly, I ADOPT the Findings and Recommendation that defendants Publishers Paper Company's motion (#22) and the Association of Western Pulp and Papers Workers, Local No. 68's motion (#25) for summary judgment should be GRANTED.

IT IS SO ORDERED.

DATED this 19 day of November, 1986.

/s/
Owen M. Panner
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KAREN MILLER, Plaintiff, v. PUBLISHERS PAPER COMPANY, A Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO.68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants.	Civil No. 85-1816-DA FINDINGS AND RECOMMENDATION FILED Apr. 14 1987

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DALE, Magistrate

Defendant Publishers Paper Company (Publishers) moves for summary judgment. The motion should be allowed. Defendants Association of Western Pulp and Paper Workers and its affiliated Local No. 68 (collectively the Union) move to dismiss for failure to state a claim. This motion should also be allowed. The action should be dismissed.

Procedural posture

On March 10, 1986, the court granted Publishers' Rule 12(b)(6) motion to dismiss plaintiff's wrongful discharge claim in the original complaint. On November 19, 1986, the court granted summary judgment for all of the defen-

dants on all remaining claims in the first amended complaint. The court then granted plaintiff's motion to file a second amended complaint on January 2, 1987. Plaintiff's second amended complaint, on its face, repeats claims previously dismissed in the court's order granting summary judgment. Nevertheless, it is clear that the only claim remaining in this litigation is plaintiff's wrongful discharge claim against Publishers in the second amended complaint filed February 25, 1987.

Facts and Standards

The September 19, 1986, findings and recommendation contains a detailed recital of the facts as well as applicable standards for ruling on motions for summary judgment.

Discussion

A. The Union

The court should grant the Union's motion to dismiss for failure to state a claim because the court previously granted the Union's motion for summary judgment. The wrongful discharge claim in the second amended complaint is directed exclusively toward Publishers.

B. The Employer

Plaintiff claims that she was

> terminated in September 1984 in retaliation for having claimed her right to receive ... disability benefits. The right to receive said benefits is an important employee-related right as acknowledged by both state and federal statutes and case law which guarantees workers the right to receive the compensation which is promised to them.

(Second Amended Complaint, ¶ XVI.

Oregon law recognizes exceptions to the general at-will employment rule in

the form of the tort of wrongful discharge. See, e.g., Delaney v. Taco Time International, 297 Or. 10, 681 P.2d 114 (1984). Plaintiff asserts that her claim falls under the second "category" identified in Delaney v. Taco Time. According to plaintiff, cases cited in Delaney v. Taco Time permit an employee to sue in tort for wrongful discharge "if he or she was fired while pursuing a right related to his or her role as an employee and the right is one of important public interest as reflected by constitutional or statutory provision or by case law." (Plaintiff's memorandum at 5).

Publishers, moving for summary judgment, argues that federal labor law preempts a plaintiff's wrongful discharge claim under principles enunciated in Allis-Chalmers Corporation v. Lueck, 471 U.S. 202 (1985) and various subse-

quent Ninth Circuit opinions. See also Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). Plaintiff responds by arguing that the tort is independent of any § 301 breach of contract claim and thus is not preempted.

The trial court's task, according to Allis-Chalmers, is to determine "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213. The Court held that when resolution of a state-law claim is

> substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see Avco Corp. v. Aero Lodge 735, [citation omitted], or dismissed as pre-empted by federal labor-contract law.

471 U.S. at 220.

In making this determination, the

Court cautioned lower courts to remember that the nature of the tort at issue is a matter of state law. However, "the question whether the ... tort is sufficiently independent of federal contract interpretation to avoid pre-emption is, of course, a question of federal law." Allis-Chalmers, 471 at 213-14. The Court freely acknowledged that these questions would have to be resolved on a case-by-case basis. 471 U.S. at 220.

Plaintiff contends that part of her compensation package entitled her to receive fringe benefits in the nature of disability payments. She further contends Publishers terminated her for having claimed her right to receive the disability benefits. (Plaintiff's memorandum at 5). Plaintiff argues that the right to receive employee benefits, including disability benefits, is one of important state interest as indicated by

Oregon statute and case law. This argument misses the mark. As the state cases plaintiff cites demonstrate, state law does indeed provide remedies for retrieving compensation. However, Publishers' obligation to pay plaintiff's compensation, including her disability benefits, as well as plaintiff's right to receive such compensation, arise not from statute but rather exclusively from the collective bargaining agreement negotiated between her union and Publishers.

Publishers has argued consistently in this litigation that it discharged plaintiff because the collective bargaining agreement gave it the right to do so. Assessment of the propriety of plaintiff's claim, as a practical matter, will require reference to, and interpretation of, the collective bargaining agreement.

Applying the considerations expressed in Allis-Chalmers, I conclude that plaintiff's claim is preempted by federal labor law. The United States Supreme Court rejected Wisconsin's attempt to demonstrate how a bad-faith handling of an insurance claim, a tort under Wisconsin law, might be unrelated to a breach of contract claim. For similar reasons, I reject plaintiff's attempt to have the finder of fact focus exclusively on Publishers' motivation in discharging her, while keeping a blind eye to pivotal contractual provisions. Resolution of plaintiff's claim is substantially dependent on analysis of the collective bargaining agreement. Consequently, plaintiff's wrongful discharge claim is preempted by federal labor law.

Conclusion

The Union's motion (#54) to dismiss for failure to state a claim should be allowed. Publishers' motion (#50) for summary judgment should be allowed. The action should be dismissed.

DATED this 14th day of April, 1987.

/s/
WILLIAM M. DALE
United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KAREN MILLER, Plaintiff, v. PUBLISHERS PAPER COMPANY, A Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO.68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, Defendants.	Civil No. 85-1816-DA ORDER FILED June 29 1987

PANNER, J.

Magistrate William M. Dale filed his Findings and Recommendation on April 14, 1987. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. §

636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the Magistrate's Findings and Recommendation that defendant Union's motion (#54) to dismiss for failure to state a claim should be ALLOWED, and defendant Publishers' motion (#50) for summary judgment should be ALLOWED. This action should be DISMISSED.

IT IS SO ORDERED.

DATED this 29 day of June, 1987.

/s/
Owen M. Panner
United States District Judge

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1714

In The

Supreme Court of the United States

October Term, 1988

KAREN MILLER,

Petitioner,

v.

PUBLISHERS PAPER COMPANY, a Delaware corporation, et al,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PUBLISHERS PAPER COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 301 of the Labor Management Relations Act preempts state law claims which require for their resolution analysis of the terms of a labor contract.

The question presented is whether an employee's state law claim for wrongful discharge is preempted by Section 301, where (i) the employee asserts that she was discharged in retaliation for insisting upon benefits conferred by a collective bargaining agreement and (ii) the employer's asserted right to terminate the employee's employment under specific circumstances related to a disability is also spelled out in the collective bargaining agreement.

2. Section 301 of the Labor Management Relations Act requires labor unions to represent their members fairly; it forbids representation which is arbitrary, discriminatory or in bad faith.

The question presented is whether a labor union fulfills its Section 301 duty when it performs a concededly complete factual investigation of a member employee's grievance against an employer, but does not (i) inform the employee of the employer's decision to terminate her employment immediately upon learning of that decision; (ii) thereafter urge the employer to modify its purportedly erroneous legal analysis; and (iii) notify the employee in advance that the union leadership's recommendation that the grievance be withdrawn will be voted upon at a regularly scheduled meeting of the union membership.

Rule 28.1 Listing

Smurfit Newsprint Corporation is a successor corporation of Publishers Paper Co. Jefferson Smurfit Corporation owns 80 percent of the stock of Smurfit Newsprint Corporation. Times Mirror Company owns 20 percent of the stock of Smurfit Newsprint Corporation.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PUBLISHERS PAPER COMPANY'S BRIEF IN OPPOSITION

Though the petition refers to Chapter 659 of the Oregon Revised Statutes (Pet 5), plaintiff does not challenge the circuit court's disposition of her state statutory claim of discrimination based upon physical handicap. Plaintiff's other claims against Publishers Paper Company – one for common law wrongful discharge under

state law and another for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act – plainly do not merit review.

STATEMENT OF THE CASE

Plaintiff's claim against Publishers for breach of the collective bargaining agreement requires proof that the unions breached their Section 301 duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 US 554, 571 (1976). Plaintiff's statement of facts omits evidence which bears on that aspect of her claim.

First, local union representatives were not told until August 21 – the same day that plaintiff and her doctors testified – that plaintiff's employment with Publishers would be terminated pursuant to Section 20D(2)(c) of the collective bargaining agreement if the physicians testified, as expected, that she was permanently disabled as a result of the automobile accident.

Not long after the jury gave her $55,000 and Publishers gave her notice that her employment was terminated, plaintiff filed her grievance. Union officials and Publishers management met twice – once in September 1984 and again in October – but Publishers refused to reinstate plaintiff. By December 1984, after reviewing a transcript of the testimony in plaintiff's personal injury trial, union leadership were convinced beyond doubt that plaintiff could not prevail in an arbitration against Publishers. A union representative reviewed the transcript with plaintiff and explained its significance to her, but

apparently did not inform her in advance that the leadership would recommend to the union membership that they vote to withdraw the grievance.

Despite plaintiff's willingness to return to work, Publishers had eliminated her job and several others during her absence, and she knew of no job she was capable of performing. Nonetheless, plaintiff filed this action after learning in May 1985 that her grievance had been withdrawn.

REASONS WHY THE PETITION SHOULD BE DENIED

I

PLAINTIFF'S CLAIM FOR COMMON LAW DISCHARGE UNDER STATE LAW

A

The circuit court's decision is not in conflict with this Court's decisions on the preemptive sweep of Section 301 of the Labor Management Relations Act.

The application of state law is preempted if the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, *Lingle v. Norge Division, Magic Chef*, 486 US ___, ___ (1988), if "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. * * *" *Allis-Chalmers Corp. v. Lueck*, 471 US 202, 213 (1985). Stated differently,

> "* * * state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. * * *" *Allis-Chalmers Corp. v. Lueck, supra*, 471 US at 213.

The circuit court's decision is faithful to those principles.

Here, plaintiff's right to disability benefits was conferred by the collective bargaining agreement; plaintiff concedes that it did not exist independently of the private contract. Here, Publishers' right to terminate plaintiff's employment upon competent medical advice that she should not resume work was also spelled out in the collective bargaining agreement; it was not a matter of state law. As the circuit court put it, "regardless of how [plaintiff's] state wrongful discharge claim is characterized, it is preempted by section 301 because it is 'inextricably intertwined' with consideration of the terms of the collective bargaining agreement." Memorandum, October 20, 1988, at 3-4. Based upon *Lingle* and *Allis-Chalmers*, that is the only conclusion supported by this record, and there is nothing to plaintiff's bald assertion of conflict between the circuit court's decision and the decisions of this Court.

B

The circuit court's decision is correct on grounds not raised in the petition.

Though the circuit court decided plaintiff's wrongful discharge claim on Section 301 preemption grounds, the court's decision is correct on at least two other grounds not raised in the petition.

First, the nature of a state tort is a matter of state law, *Allis-Chalmers Corp. v. Lueck, supra*, 471 US at 213-214, and plaintiff's complaint does not state a claim for wrongful discharge. In Oregon, the tort wrongful discharge

evolved as a limited exception to the rule that an at-will employee may be discharged at any time, for any reason. *See, e.g., Simpson v. Western Graphics*, 293 Or 96, 99, 643 P2d 1276 (1982). The tort protects only (i) those who have been discharged for performing important societal obligations such as jury duty, *Nees v. Hocks*, 272 Or 210, 536 P2d 512 (1975), or refusing to defame another, *Delaney v. Taco Time Int'l.*, 297 Or 10, 681 P2d 114 (1984); and (ii) those who have been discharged for exercising statutory rights, not private contractual rights, related to their role as an employee. *See, e.g., Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984); *Brown v. Transcon Lines*, 284 Or 597, 588 P2d 1087 (1978). The Oregon Court of Appeals has declined to extend the tort to cover those subject to a collective bargaining agreement. *Embry v. Pac. Stationery and Printing Co.*, 62 Or App 113, 659 P2d 436 (1983).

This plaintiff was subject to a collective bargaining agreement, and the record permits no inference that she was discharged for performing a societal obligation, important or otherwise, or for exercising a statutory right at all, let alone one related to her employment. Because that is so, the circuit court decided plaintiff's wrongful discharge claim correctly, and this Court need never reach the first question raised in the petition (Pet i).

Plaintiff's wrongful discharge claim is also foreclosed by so-called Garmon preemption, which is another reason this Court need not address the first question raised in the petition. Garmon preemption holds that when an activity is arguably subject to Section 7 or 8 of the National Labor Relations Act, "the States as well as the federal courts must defer to the exclusive competence of

the National Labor Relations Board * * *." *San Diego Building Trades Council v. Garmon*, 359 US 236, 245 (1959).[1] When plaintiff requested and obtained disability benefits under the collective bargaining agreement, she engaged in "concerted activity" protected by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 US 822, 831-832 (1984). Had Publishers terminated plaintiff's employment for that activity, as plaintiff alleges, that termination would have been in violation of Section 8 of the Act.

---

[1] Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 USC § 157.

Section 8 of the Act provides in pertinent part:

> "(a) It shall be an unfair labor practice for an employer –
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 USC § 158.

Because that is so, plaintiff's claim for wrongful discharge is preempted. *San Diego Building Trades Council v. Garmon, supra,* 359 US at 245. As a consequence, there is no need to decide the first question raised in the petition.

II

PLAINTIFF'S CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

A

The circuit court's decision is not in conflict with this Court's decision in *Vaca v. Sipes*.

A union employee who claims to have been discharged by an employer in violation of a collective bargaining agreement must prove, not only that the employer breached the agreement, but also that the union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc., supra,* 424 US at 570. *See DelCostello v. Teamsters,* 462 US 151, 164 (1983); *United Parcel Service v. Mitchell,* 451 US 56, 62 (1981). That duty is breached only if a union's representation is "arbitrary, discriminatory, or in bad faith. * * *" *Vaca v. Sipes,* 386 US 171, 190 (1967).

The circuit court held that the unions did not breach their duty of fair representation in this case. Memorandum, October 20, 1988, at 6-7. The petition asserts (Pet 29), with not a single word of analysis, that the circuit court's decision "is in conflict with this Court's pronouncements in *Vaca v. Sipes* * * *." Conflicts, however, do not exist simply because lawyers say they do, and any supposed conflict between the circuit court's decision here and this Court's decision in *Vaca v. Sipes* is indiscernible.

B

The circuit court's decision is not in conflict with decisions in other circuits.

Neither is the circuit court's decision, which is extraordinarily fact-specific, in conflict with the decisions of the Courts of Appeal for the Fourth and District of Columbia Circuits.[2]

The collective bargaining agreement permitted Publishers to terminate plaintiff's benefits under the agreement if "competent medical authority advises that such employee is deemed permanently disabled to the point where employment should not be resumed." The circuit court rejected as untenable plaintiff's assertion that the unions breached their duty of fair representation by failing to inform plaintiff that Publishers would terminate her benefits if her physicians testified in the personal injury trial that she was totally disabled. Memorandum, October 20, 1988, at 7. The court reasoned that, because "* * * there is no evidence that [plaintiff's] doctors testified untruthfully at the trial, we must assume that prior knowledge of Publishers' intentions by [plaintiff] would not have affected her termination." *Id.* That holding is not in conflict with *Warehouse Union, Local 860 v. National Labor Relations Board*, 652 F2d 1022 (DC Cir 1981).

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[2] The petition's second question (Pet i-ii) ("Whether Plaintiff-Petitioner raised a genuine issue of material fact * * *") underscores the fact-specific nature of the decision, a circumstance which itself should foreclose a grant of certiorari. *United States v. Johnston*, 268 US 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The court in *Warehouse Union* held that the union acted arbitrarily when, in the course of protracted labor negotiations, it did not inform certain of its members of management's repeated threats to eliminate the members' jobs if they insisted upon substantial wage hikes. The unions' arbitrary conduct was detrimental to the bargaining employees because it prevented them from making "an informed reassessment of their wage demand. * * *" 652 F2d at 1025. In the case before the Court today, however, even if the unions had informed plaintiff of Publishers' intentions before her doctors testified, their testimony would have been the same. One does not "reassess" and change one's injuries (at least not prior to the recovery of a substantial verdict on account of them) the way one reassesses and changes wage demands, and plaintiff's speculation (Pet 27-28) that her lawyers may have been able to persuade the doctors to shade their testimony or that they could have settled the case, had they known of Publishers' intentions, is still only speculation – and not very good speculation, at that; it has no record support.

This case is also quite different from and not inconsistent with *Carpenter v. West Virginia Flat Glass, Inc.*, 763 F2d 622 (4th Cir 1985), where the union acted arbitrarily in failing to ask an examining physician his opinion whether the discharged employee was physically able to work. That opinion, had it been expressed, would have resulted in the employee's return to work. Here, the circuit court held that the unions acted within the bounds of permissible discretion, not discriminatorily or in bad faith, when they did not urge Publishers to consider whether plaintiff could perform a job other than her old

one, which had been eliminated. Memorandum, October 20, 1988, at 5, 7. Though the circuit court did not say so in its decision, there was no evidence of any job plaintiff was capable of performing – she said she could not even tip her head to drink a soda – and the unions' failure to object to Publishers' allegedly improper job comparison, unlike the union's failure to ask the doctor's opinion in *Carpenter*, was therefore not the least bit crucial to plaintiff's grievance. The two decisions are not at all inconsistent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-1714

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

KAREN MILLER,

Plaintiff-Petitioner,

v.

PUBLISHERS PAPER COMPANY, a Delaware corporation; ASSOCIATION OF WESTERN PULP AND PAPER WORKERS, LOCAL NO. 68; and ASSOCIATION OF WESTERN PULP AND PAPER WORKERS,

Defendants-Respondents.

PLAINTIFF-PETITIONER'S REPLY BRIEF

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PLAINTIFF-PETITIONER'S REPLY BRIEF

I. The Circuit Court's Affirmation Of Judgment Against Plaintiff's Wrongful Discharge Claim Is Incorrect On All Grounds.

In its Brief in Opposition, Defendant-Respondent Publishers Paper Company (hereafter "Defendant Publishers") asserts that the Ninth Circuit's decision against Plaintiff's wrongful discharge claim was proper on two grounds besides Section 301

preemption. Defendant Publishers is incorrect.

First Defendant Publishers asserts that Plaintiff has not stated a claim for wrongful discharge under Oregon law, arguing that the Oregon Court of Appeals in Embry v. Pacific Stationery and Printing Co., 62 OrApp 113, 659 P2d 426 (1983), declined to extend the tort to cover employees subject to a collective bargaining agreement. Defendant Publishers misconstrues Embry. Embry was not decided on the basis of Oregon common law but rather on the basis of federal labor caselaw which existed at the time. The court in Embry essentially held that based on then-current federal caselaw the plaintiff's wrongful discharge claim was preempted by federal labor law. Embry, supra, 62 OrApp at 116-117. After Embry was decided this Court ruled that a

wrongful discharge claim which does not require an interpretation of a collective bargaining agreement for its resolution is not preempted by Section 301. Lingle v. Norge Division of Magic Chef, Inc., 486 US ___, 108 SCt 1877, 1885 (1988). Therefore, as Embry does not stand for the proposition Defendant Publishers attributes to it and in any event was decided on the basis of now-outdated federal labor caselaw, it does not support Defendant Publishers' argument that Plaintiff failed to state a claim for tortious wrongful discharge.

Defendant Publishers next argues that Plaintiff's wrongful discharge claim is preempted by the National Labor Relations Act (NLRA). Defendant Publishers is mistaken.

In fashioning the test for preemption under § 301 this Court in

Allis-Chalmers relied heavily on its decisions involving NLRA preemption, including Alexander v. Gardner-Denver Company, 415 US 36 (1974). Allis-Chalmers v. Lueck, 471 US 202, 213 (1985). In Alexander v. Gardner-Denver this Court said that it

> "found that the NLRA conferred rights 'on employees collectively to foster the process of bargaining,' id., at 51, 39 LEd2d 147, 94 SCt 1011, and distinguished such rights which could be waived by contract between the parties, on the one hand, from an individual's substantive rights derived from an independent body of law that could not be avoided by contractual agreement, on the other." Allis-Chalmers, supra, 471 US at 213, n. 8.

Plaintiff's wrongful discharge claim is based on the Oregon common law tort of wrongful discharge. As such it is derived from an independent body of law and cannot be waived by contractual agreement between

the parties. Therefore, it is not preempted by the NLRA.

Moreover, applying San Diego Building Trades v. Garmon, 359 US 236 (1959) to this case, as Defendant Publishers suggests should be done, leads to the conclusion that her wrongful discharge claim is not preempted. For as explained by the Oregon Supreme Court, this Court "has also stated that states do have power to regulate activity which is a 'peripheral concern' of the Labor Management Relations Act, or where the regulated conduct touches interest 'deeply rooted in local feeling and responsibility.'" Vaughn v. Pacific Northwest Bell Telephone Company, 289 Or 73, 82, 611 P2d 281 (1980) citing San Diego Building Trades Council v. Garmon, supra, 359 US at 243-244. Oregon has a deep interest in its workers receiving the compensation which they are

due as reflected by the statutes enacted to enable employees to obtain their compensation. ORS chapter 652. Oregon also has a vital concern in prohibiting an employer from discharging a worker in retaliation for the employee pursuing an important job-related right such as the right to receive one's compensation. Delaney v. Taco Time Int'l, 297 Or 10, 16, 681 P2d 114 (1984). Therefore, as Plaintiff's wrongful discharge claim for being terminated in retaliation for pursing her disability benefits concerns interests "deeply rooted in local feeling and responsibility", this claim is not preempted under Garmon.

II. The Circuit Court's Decision Granting Summary Judgment Against Plaintiff's Breach Of The Duty Of Fair Representation Claim Is In Conflict With Both This Court's And Other Circuit Courts' Decisions.

This Court explained in Vaca v. Sipes, 386 US 171, 190 (1967), that a union breaches its duty of fair representation owed towards a member when its conduct is arbitrary, discriminatory or in bad faith. Here there is evidence from which it could be concluded that Plaintiff was handicapped or was perceived as being a handicapped person. There is also evidence that the Union Defendants failed to warn Plaintiff of her employer's plan to terminate her if her doctors testified at her personal injury trial that she was permanently disabled. The evidence also shows that the Union Defendants failed to inform her in advance that the leadership would recommend to the union membership

that they vote to withdraw her grievance. This evidence permits the reasonable inference that the Union Defendants' conduct in this regard was motivated by discrimination against Plaintiff on the basis of a real or perceived physical handicap and therefore was violative of the standard set out in Vaca v. Sipes.

Plaintiff explained in her Petition how the circuit court's decision conflicted with that of other circuit courts.

III. Conclusion

Plaintiff's Petition for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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